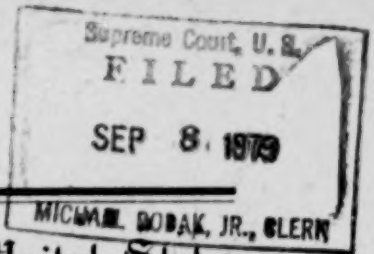


No. 79-78



In the Supreme Court of the United States

OCTOBER TERM, 1978

EDDIE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINIONS BELOW

The judgment and order of the court of appeals (Pet. App. 1a-4a) and the memorandum opinion of the district court (Pet. App. 5a-10a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1979. The petition for a writ of certiorari was filed on July 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's application for a wire interception order sufficiently established that other investigative procedures were inadequate, as required by 18 U.S.C. 2518(1)(c).

(1)

2. Whether the seizure of narcotics in this case resulted from a warrantless entry into a private dwelling in violation of the Fourth Amendment.

STATEMENT

After a bench trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on 13 counts of manufacturing, distributing, and possessing heroin and cocaine, in violation of 21 U.S.C. 841, and of conspiracy to commit those offenses, in violation of 21 U.S.C. 846. He was sentenced to a total of 20 years' imprisonment, a three-year special parole term, and a fine of \$5,000 on each count. The court of appeals affirmed. *United States v. Woods*, 544 F. 2d 242 (6th Cir. 1976), cert. denied, 431 U.S. 954 (1977). Petitioner thereafter moved for vacation of his sentence under 28 U.S.C. 2255, and his motion was denied by the district court without a hearing (Pet. App. 5a-10a). The court of appeals affirmed in part and reversed and remanded in part (Pet. App. 1a-4a).¹

Prior to the trial of the charges against petitioner, a hearing was held on his motion to suppress evidence seized at 19315 Hubbell Street in Detroit, the headquarters of a wide-ranging narcotics conspiracy headed by petitioner (R.A. 28-53).² Briefly, the evidence at the hearing showed that on December 15, 1971, conversations overheard pursuant to court-ordered telephone interceptions of the Hubbell Street premises indicated that a long-awaited shipment of narcotics had arrived and was being

¹The court of appeals found that the sentences imposed on five counts were multiplicitous. The partial reversal resulted in a reduction of petitioner's fine by \$25,000 but did not affect the length of his prison term.

²"R.A." refers to the record on appeal.

distributed rapidly. Between 9:00 and 9:45 that evening, police arrested three suspected distributors shortly after they left the Hubbell Street premises, discovering quantities of narcotics on their persons. At about 9:45, DEA Agent Garibotto, en route to the home of United States District Judge Kennedy with an application for a warrant to search the Hubbell Street house, was informed of these arrests. He thereupon ordered the agents in the vicinity to arrest petitioner and the other occupants of the house immediately. When the occupants failed to respond to knocks, the agents forced entry into the premises and made the arrests. At that time the agents observed narcotics in plain view. At approximately 10:00 p.m., Agent Garibotto was notified of the arrests and that narcotics had been found, and he added this information to his affidavit. Judge Kennedy issued the search warrant shortly thereafter. The subsequent search of the house revealed large quantities of heroin and cocaine. Pet. App. 24a-26a.

ARGUMENT

Petitioner contends that he is entitled to vacation of his sentence under Section 2255 because the government's showing in its application for a telephone intercept order that other investigative procedures were inadequate, as required by 18 U.S.C. 2518(1)(c), was false and misleading, and because the seizure of narcotics from the Hubbell Street house resulted from an invalid warrantless entry to arrest its occupants. Since both of these claims were considered and rejected on the merits by the court of appeals on direct appeal (Pet. App. 16a-17a, 24a-28a), the court below, in denying petitioner Section 2255 relief, correctly declined to reconsider them (Pet. App. 1a-2a, 6a-7a). See *Kaufman v. United States*, 394 U.S. 217, 227 n.8 (1969); *Sanders v. United States*, 373 U.S. 1 (1963);

Polizzi v. United States, 550 F. 2d 1133, 1135-1136 (9th Cir. 1976); *Stephan v. United States*, 496 F. 2d 527, 529 (6th Cir. 1974). There is accordingly no reason for this Court to grant further review. In any event, petitioner's claims lack merit.

1. Petitioner argues that the application for the intercept order was false and misleading because it failed to reveal that a government informant had been offered and had declined a responsible position in petitioner's organization.¹ But as the court of appeals found on direct appeal (Pet. App. 17a), it was unlikely that even in that position the informant would have learned "all the complex details of the widespread organization, and its aiders and abettors." Moreover, "in view of [the informant's] lengthy prior criminal record, the government would have had great difficulty in establishing criminal liability by his testimony alone."² In any event, the use of an informant was not withheld from the court; the intercept application expressly stated that the government had received some of its information from a confidential informant (Pet. App. 42a). The chance that the informant might have been able to obtain additional information was immaterial, and the omission of this speculative possibility from the application did not affect the validity of the authorization. See *United States v. Pacheco*, 489 F. 2d 554, 565 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975).

¹Petitioner unsuccessfully raised this issue in his petition for a writ of certiorari seeking review of the affirmance of his conviction on direct appeal (Pet. No. 76-1360 at 22-31).

²To have outfitted the informant with a transmitter and recording device, as petitioner proposes (Pet. 23), would have seriously jeopardized not only his safety but also the success of the entire investigation, because of the risk that the devices would be discovered.

Nor does *Franks v. Delaware*, 438 U.S. 154 (1978), entitle petitioner to a hearing on his claim. *Franks* requires the defendant to make a substantial preliminary showing that the alleged misstatement is material and intentional (438 U.S. at 155-156, 171-172). Even if the failure to mention a possible source of information in the application for the intercept order constitutes a misstatement of the sort to which *Franks* applies (but see Pet. App. 9a), petitioner has failed to make the necessary preliminary showing. Since, as both courts below found on direct appeal, the inclusion of the omitted information would not have suggested that an intercept order was unnecessary, the omission of the information was not material. Petitioner was accordingly not entitled to a hearing under *Franks*.

2. Petitioner's contention that the agents' warrantless entry into the Hubbell Street house was a pretext to search it for narcotics, rather than to arrest him, is likewise without merit.³ The entry was justified by exigent circumstances. Both the district court and the court of appeals credited Agent Garibotto's testimony that the decision to make the arrests immediately, rather than waiting for a warrant, resulted from the fast-breaking situation with which agents were faced. Telephone conversations intercepted from the premises on December 15 indicated that a long awaited shipment of narcotics had arrived. The arrests of three persons within a 45 minute period that evening as they left the premises and the discovery of narcotics in their possession, together with the interception of outgoing calls from the house setting up additional sales, established that the narcotics were being distributed rapidly. As the court of appeals found on direct appeal (Pet. App. 27a), "[t]here was real concern

³Petitioner does not contend, as indeed he could not, that the agents lacked probable cause to arrest him.

for preventing the unlawful distribution of a large shipment of narcotics to other purchasers, as well as a desire to effect the arrests while there was sufficient manpower available." These concerns justified immediate entry into the Hubbell Street premises to make the arrests. See *United States v. Johnson*, 561 F. 2d 832 (D.C. Cir. 1977) en banc.⁶

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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⁶The issue of the legality of a warrantless entry into a private dwelling to arrest its occupant *absent* exigent circumstances, currently before this Court in *Payton v. New York*, No. 78-5420, and *Riddick v. New York*, No. 78-5421, restored to the calendar for reargument April 30, 1979, is not presented by this case.

*The Solicitor General is disqualified in this case.